Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Local Exchange Carrier's Rates	)	CC Docket No. 93-162
Terms and Conditions for Expanded	)	Phase I
Interconnection for Special Access	)	

REPLY

BellSouth Telecommunications Inc. ("BellSouth") hereby submits its Reply to the Oppositions to its Petition for Reconsideration of the Commission's First Report and Order in the above referenced proceeding.

The main argument presented in BellSouth's petition is that the Commission exceeded its statutory authority when it prescribed interim expanded interconnection rates subject to a two-way adjustment mechanism. The Commission's action did not satisfy the statutory criteria for a valid prescription under Section 205 of the Communications Act. Because the Commission lacked the information to make a determination of a just and reasonable rate, even for an interim period, the only course available to the Commission that was consistent with the Communications Act was to permit initially filed rates to take effect at the conclusion of the suspension period.

Three parties opposed BellSouth's petition.[1] The oppositions are predicated on incorrect factual assumptions or a misapplication of the prevailing law. As a result, their arguments are inapposite to the instant case.

MFS postulates that the Commission faced a choice of either permitting unjustified rates to take effect or to delay the effectiveness of expanded interconnection (indefinite suspension).[2] The essential predicate of MFS's position is that, absent the action taken by the Commission in the First Report and Order, expanded interconnection would have been indefinitely delayed. The flaw in MFS's position is that the predicate does not conform to the facts.

MFS, as well as the other parties, conveniently overlook the fact that expanded interconnection tariff was already in effect. Indeed, BellSouth received its first firm order under the expanded interconnection tariff on September 6, 1993, a full two months before the First Report and Order was issued. There was no question of "indefinite" delay being faced by the Commission.

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[1] The parties filing oppositions were The Association of Local Telecommunications Services ("ALTS"), MFS Telecommunications Company, Inc. ("MFS"), and AD HOC Telecommunications Users Committee ("AD HOC"). The Ameritech Operating Companies ("Ameritech") filed comments supporting BellSouth's Petition for Reconsideration.

[2] MFS at 7-8.

In fact, the expanded interconnection rates were partially suspended by the Commission for the full five month statutory period under Section 204(a) of the Act. The remainder to the rates and the terms and conditions for expanded interconnection were permitted to take effect subject to an accounting order after being suspended for one day. Pursuant to Section 204(a) the Commission commenced an investigation.

The fact that the Commission had partially suspended the initial rates filed by BellSouth for the full five month statutory period required the Commission to act in some manner in November 1993. The statutory alternatives faced by the Commission was that it could have prescribed a rate pursuant to Section 205 of the Act, or continue its investigation but allow the suspended rates to become effective.

The parties opposing BellSouth's petition contend that the Commission had the authority to prescribe a rate at this stage of the proceeding.[3] BellSouth does not dispute the Commission's statutory authority to prescribe, even on an interim basis.[4] The point missed by the opposing parties is

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[3] See e.g., AD HOC at 5-6.

[4] AD HOC appears to interpret BellSouth's petition as claiming that the Commission could not make an interim prescription and then after a further hearing revise that prescription. AD HOC misreads BellSouth's petition. BellSouth does not contend that the Commission cannot revise an existing prescription. Any represcription, however, can only have prospective effect.

that a prescription requires a finding that the rate prescribed on an interim basis is just and reasonable and is to be "thereafter observed."[5]

The First Report and Order did not mandate such a prescription. Instead, the interim prescription is subject to a two-way adjustment mechanism. Under this mechanism, the interim prescription can, by subsequent order of the Commission, be found to be either too high or too low ab initio with either refunds or retroactive charges flowing therefrom.

The law is well established, however, that once the Commission has prescribed a rate, it cannot retroactively declare that rate unreasonable. The Supreme Court in explaining the effect of prescription under the Interstate Commerce Act, upon which the Communications Act is patterned, stated:

> Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the

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[5] 47 U.S.C. 205(a). It should be noted, however, that there is no record evidence to support the use of ARMIS data in prescribing just and reasonable charges. Despite the Commission's claim that BellSouth had not met its burden in the investigation, the only opposition to BellSouth's direct case on overhead loadings were a few general objections made by ALTS.

Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.[6]

The First Report and Order establishes a scheme which would have the same outcome that the Supreme Court has proscribed. Indeed, as pointed out in Ameritech's comments, the Commission's attempt in its First Report and Order to prescribe rates while at the same time allowing refunds and recoupments improperly blends its authority to order refunds contained in Section 204(a) with its authority to prescribe rates prospectively under Section 205. In Illinois Bell v. FCC,[7] the Court of Appeals for the District of Columbia Circuit admonished the Commission that it was not free to blend or pick and choose its authority under Sections 204 and 205 of the Act.

Contrary to the belief of the opposing parties, the Commission's reliance on Section 4(i) does nothing to rehabilitate the First Report and Order.[8] Section 4(i) only empowers the Commission to perform such acts and issue such orders that are consistent with the other provisions of the Communications Act. It does not empower the Commission to rewrite the Act.

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[6] Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co. et. al., 284 U.S. 370, 390 (1932).

[7] Illinois Bell Telephone Co. v. FCC, 966 F. 2d 1478 (D.C. Cir. 1992).

[8] AD HOC at 19; MFS at 11-12; ALTS at 7-11.

Whatever neutral intentions the Commission may have had in devising its two-way adjustable prescription, the fact remains that its actions in the First Report and Order fall outside the statute's boundaries. Accordingly, the Commission should grant BellSouth's petition for reconsideration.

Respectfully submitted,

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DATE: February 22, 1994

CERTIFICATE OF SERVICE

I hereby certify that I have on this 22nd day of February, 1994, served the foregoing REPLY, by placing a true and correct copy of same in the United States mail, postage prepaid, to the persons listed below.

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